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No. ____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

FREDERICK P. ANDREWS and EDITH W. ANDREWS,
Petitioners,

v.

DISTRICT OF COLUMBIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

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QUESTIONS PRESENTED

1. Whether the refusal of the District of Columbia Court of Appeals to hold that the District Government had no authority to tax persons on their income derived after they left the District to live in a city abroad, absent proof they always had a fixed and definite intent to return and make their home in the District again, was an egregious error of more than local importance.

2. Whether the District Government acted in bad faith in forcing petitioners to litigate the need for such proof in the face of this Court's early ruling on the procedure to be followed in determining District income tax liability where change in domicile is claimed.

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DISTRICT OF COLUMBIA,
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PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

PETITION

The petitioners Frederick P. Andrews and Edith W. Andrews respectfully pray that a writ of certiorari issue to review the judgment and opinion of the District of Columbia Court of Appeals entered in this proceeding on April 1, 1982.

OPINION BELOW

The opinion of the District of Columbia Court of Appeals, not yet reported, appears in the appendix hereto. No opinion was rendered by the Superior Court of the District of Columbia.

JURISDICTION

The judgment of the District of Columbia Court of Appeals was entered April 1, 1982. A timely petition for

rehearing was denied May 21, 1982, and this petition is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3) and D.C. Code (1981), § 11-102.

STATUTORY PROVISIONS INVOLVED

D.C. Code (1981), § 47.806.3(a):

> [T]here is hereby imposed on the taxable income of every resident a tax determined in accordance with the following table. . . .

D.C. Code (1981), § 47-801.4(17):

> The word "resident" means every individual domiciled within the District on the last day of the taxable year . . . and every other individual who maintains a place of abode within the District for more than 7 months of the taxable year, whether domiciled in the District or not. . . .

D.C. Code (1981), § 47-801.4(4):

> The word "individual" means all natural persons (other than fiduciaries) whether married or unmarried.

STATEMENT OF THE CASE

The origin of the controversy—This case arose out of respondent's denials on March 24, 1972, and May 25, 1972, of petitioners' claims under dates of March 2, 1972, and April 13, 1972, for refund of $1,813 in taxes levied on income derived during the first 21 months after petitioners left the District to live in Geneva, Switzerland (R. 323, 327, 332, 333). The refunds were denied on the basis of "determinations" that petitioners continued to be "resi-

dent," or "domiciled," or both, in the District until they "moved to Maryland" on August 13, 1971 (*id.*).[1]

Petitioners' District domicile and its background— Petitioners, Mr. and Mrs. Andrews, first came to the District in 1961 when they were 56 and 49 years of age, respectively (R. 582, 584). Mr. Andrews was a British citizen (R. 157-158), a furniture designer by profession (R. 171, 33), in poor health (R. 17, 25, 54-55), and financially dependent on his wife (R. 170-171). Mrs. Andrews was a United States citizen and an international labor economist (R. 582-585). During the early years of her career she was employed in Chicago, New York City, Meadville, Pennsylvania, and New York again. She entered the United States Foreign Service in 1941 and for 15 years served successively in Algiers, Rome, Copenhagen, New Delhi, and Madras (R. 584-585). She resigned in order to marry Mr. Andrews in 1956 (R. 53, 584). They lived in Madras until he suffered a serious illness and in 1958 they moved to Stratford on Avon, England (R. 134), for his convalescence (R. 54). In 1961 they moved to Washington and Mrs. Andrews took a position with the Bureau of Labor Statistics of the Department of Labor (R. 584). In 1964 they moved into a house on McKinley Street, N.W. (R. 14-16). After eight years with the B.L.S. and contemplating ultimate retirement abroad (R. 25, 33), Mrs. Andrews applied for a position with the International Labor Office in Geneva, Switzerland (R. 582-585). The Andrews hoped that she could work for a few more years during which she would build up a retirement annuity that would enable them to

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[1] Respondent has never explained the inconsistency of its determinations for the first and the last parts of 1971 (see Appellants' Br. filed May 11, 1981, p. 14; R.651).

finance a home for their retirement in Malta or a similar spot (R. 25, 28, 34-38). Under the Federal Employees International Organizations Service Act (5 U.S.C. §§ 3581-3585) she could continue to accrue her Civil Service retirement benefits, by making the appropriate periodic payments for that purpose through the Labor Department (R. 588-589, 81-82). When the ILO proposed a one-year contract, as was customary there, she was reluctant to accept it and sought assurance of longer service (R. 27-31; 582, line 19; 33-34). The ILO's formal offer of a one-year contract was accompanied by written (R. 586) and oral assurances of renewal, subject to the availability of funds (R. 28-31, 79).

Petitioners' stay abroad—Petitioners sold their McKinley Street house and their furniture (R. 33), Mrs. Andrews was "separated" from her B.L.S. employment effective November 15, 1969 (R. 587), they left Washington, and on November 17, 1969, she entered her position with the ILO (R. 590).

They had been living in Geneva only six months when the ILO became faced with a financial crisis resulting from the United States failure to pay its membership dues (R. 32, 100, 101) in protest of the ILO's granting observer's status to the Palestine Liberation Organization. Mrs. Andrews was led to believe that her one-year contract would nevertheless be renewed when it expired in November, 1970 (R. 102-104, 108-110). It was, but only for seven and a half months, to June 30, 1971 (R. 32, 590-591). She remained hopeful her contract would be extended again (R. 100-101) but by April of 1971 she "realized" she would have to look for a job in Washington (R. 89, 116).

Petitioners' return to the United States—Before leaving Geneva, the Andrews visited Cyprus, toured the

island, bought a piece of land there for their retirement home, and made preliminary arrangements for its construction (R. 37-38, 135). (The house was under construction three years later at the time of the trial and was expected to be completed in January 1974; they went there to live in 1974 (R. 510, 548.) They returned to the States from Geneva July 7, 1971, stayed a few days with Mrs. Andrews' brother in Fairfax, Virginia, and stayed a month in an apartment hotel in Washington while they continued looking for a place to live. At first undecided between Virginia and Maryland, they decided on Maryland (R. 71-72). They bought a house in Bethesda, Maryland, and moved into it on August 13, 1971, five and half weeks after they left Geneva (R. 13-14).

The trial court proceedings—Petitioners filed a timely petition in the Superior Court of the District of Columbia, Tax Division, praying "refund of $1,813, with interest, court costs, and reasonable attorney's fees" (R. 326). Respondent denied liability (R. 327) and the case was tried without a jury on April 16 and 17, 1973 (R. 210). Relying (R. 346-347) on *District of Columbia* v. *Murphy*[2] and *Pace* v. *District of Columbia*,[3] petitioners noted that "[t]he presumption of continuance of domicile of origin has given way to the presumption of domicile in the territory in which one is a resident until the contrary is demonstrated" (*Pace*, 77 U.S. App. D.C. at 334, 135 F.2d at 251).

When, after six years, respondent replied to petitioners' motion for decision by offering to settle for $1,813 and

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[2] 314 U.S. 441 (1941), hereinafter referred to as "*Murphy*."

[3] 77 U.S. App. D.C. 332, 135 F.2d 249 (1943), affirmed, 320 U.S. 698 (1944), hereinafter referred to as "*Pace*."

4% interest, but no attorneys' fees, court costs, or higher rate of interest (R. 602), petitioners opposed the offer (R. 604, 608) and filed a brief on the merits with requested findings (R. 624-627). Subsequently, in response to the court's declaration that it wanted all "these matters locked into one order" (R. 292), petitioners filed a motion for attorney's fees of $10,000 for services and expenditures (including court costs) and for interest at from 5.14% to 5.75%, and requested further findings (R. 674-696). Respondent filed a timely reply (R. 698-709). Six months later the court entered an order directing the refund of $1,813 with 4% interest and denying the other relief petitioners had sought (R. 717).

The proceedings on appeal.—On appeal the court below affirmed. Although it said that the *Murphy* presumption of domicile where one lives was applicable (Slip Op., *infra*, p. 7a), it held that petitioners, somehow, nevertheless bore the burden of establishing by evidence that they were domiciled in Geneva while living there (Slip. Op. *infra*, p. 8a). On that basis, it held that "[a] trial court could reasonably have concluded" from some evidence adduced at the trial "that [petitioners'] domicile was in the District . . ." (Slip Op., *infra*, p. 8a). Also, that "[s]ince [respondent] could have reasonably expected to prevail based on this testimony, the trial court could conclude that [respondent] did not act in bad faith in continuing defending the suit . . ." (Slip Op., *infra*, p. 9a). A timely petition for rehearing was denied. One member of the three judge panel dissented with a one-paragraph explanation (Slip Op., *infra*, p. 11a).

REASONS FOR GRANTING THE WRIT

The decision of the court below should be reviewed for a combination of independently sufficient reasons based on

the principles reflected in numerous exceptions to the Court's policy of deferring to the judgment of that court in matters of local law.[4]

I. The Decision Below Would Egregiously Pervert This Court's Ruling In *Murphy* With More Than Locally Important Impact

Referring to petitioners' argument that for District income tax purposes *Murphy* established the presumption that one is domiciled where one lives and that the burden of proving the contrary is on the party claiming otherwise, the court below held (Slip Op., *infra*, pp. 7a-8a):

> [Petitioners] are correct in their contention that "the place where a man lives is properly taken to be his domicile until facts adduced establish the contrary" [citing *Murphy* at 455], but they are wrong as to the burden of proof.

Petitioners had argued that to satisfy the qualification of the *Murphy* presumption ("until facts adduced establish the contrary"), facts must be adduced establishing a fixed

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[4] *Whalen* v. *United States*, 445 U.S. 684, 687-688 (1980);
Pernell v. *Southland Realty*, 416 U.S. 363, 367-369 (1974);
General Motors Corp. v. *District of Columbia*, 380 U.S. 553, 556-557 (1965);
Miller v. *United States*, 357 U.S. 301, 306 (1958);
District of Columbia v. *Thompson Co.*, 346 U.S. 100 (1953);
Griffin v. *United States*, 336 U.S. 704, 707-709, 715-716 (1949);
Fisher v. *United States*, 328 U.S. 463, 476-477 (1946);
District of Columbia v. *Pace*, 320 U.S. 698, 700 (1944);
District of Columbia v. *Murphy*, 314 U.S. 441, 449 (1941);
Loughran v. *Loughran*, 292 U.S. 216 (1934)
Washington Fidelity National Insurance Co. v. *Burton*, 287 U.S. 97 (1932)

and definite intent to return and make one's home in his former domicile (Appellants' Br. pp. 12-13).

A. *Murphy long ago provided a plain procedure for determining District income tax liability where change in domicile is claimed.*—The question that was addressed there had "long been a source of litigation in the courts of this jurisdiction"—a "problem" stemming from taxpayers' reliance on the presumption of continuity of a previously established domicile to escape the tax (*Alexander* v. *District of Columbia*, 370 A.2d 1327, 1329-1330 (D.C. App. 1977), hereinafter referred to as "*Alexander*").

In spite of the recognition of that problem in *Alexander*, the opinion of the court here manifests no understanding of the problem, or of its resolution by *Murphy*. There the Court had first clarified the meaning of "domicile," the "fulcrum" of liability to the District income tax (314 U.S. at 449, *et seq.*). It held that persons do not become domiciled here simply by coming here to live (314 U.S. at 454); they must, in addition, "have no fixed and definite intent to return to make their homes where they were formerly domiciled" (314 U.S. at 454-455). It pointed out the difficulties of determining domicile on consideration of the "indicia of where a man's home is and according to the established modes of proof" (314 U.S. at 455).

The Court then went on to establish a new procedure for settling that question for District tax purposes. It built on the traditional presumption of domicile where one lives (using the words quoted by the court below (*supra*, p. 7)). It made that presumption applicable to anyone "quartered" in the District on tax day (December 31),

even where domiciliary status might seem doubtful.[5] And, importantly, it did not leave that presumption open-ended. It spelled out the intent to return and make one's home in his previously established domicile that would have to be shown to overcome that presumption. Thus it defined what "the facts adduced" would have to show in order to "establish the contrary," within the meaning of the qualification of the Court's presumption. Moreover, by its own terms that condition could never be satisfied by reliance on the previously dominant continuity presumption, for it called for *facts* to be adduced. The Court specified that the intent must be "fixed and definite," and "unconditional," although the time may be "contingent" (314 U.S. at 454-455, n.9). An initial intent on first moving would not be enough; it must continue on tax day, and must never have wavered (314 U.S. at 456). Thus the problem arising from reliance on the continuity presumption was resolved by doing away with that presumption for the purpose of District income tax law where change is in issue. *Pace* (77 U.S. App. D.C. at 334, 135 F.2d at p. 251, n.5).

B. *The court below egregiously misconstrued the Murphy opinion, reintroducing and adding to the problem Murphy resolved.*—Despite its recognition of the applicability of the *Murphy* presumption in this case, the court below held that "it was [petitioners'] burden to prove that they had changed their domicile" (Slip Op., *infra*, pp. 7a-8a). That holding was expressly based on a single short sentence from a page in *Murphy* (314 U.S., at

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[5] "The taxing authority is warranted in treating as prima facie taxable anyone quartered in the District on tax day [December 31] whose status it seems doubtful" (314 U.S. at 445).

456) that the court otherwise disregarded (Slip Op., *infra*, p. 8a):

> If one has at any time become domiciled in the District it is his burden to establish any change of status upon which he relies to escape the tax.

It is true that, standing alone, the sentence does seem at first to support that holding. But the opinion in *Murphy* had just pointed out that a person's intent on first coming to the District might subsequently have gradually "withered" and "finally dissipated." The sentence in question clarified the status of such a person whose intention later revives, and defined the limit to the presumption, i.e., such a person cannot, merely by changing his mind, revive the presumption that has become *functus officio*. Moreover, properly read, the sentence is part of the premise for the conclusion in the following sentence: that to escape taxation where he lives "one who comes to the District . . . [must] *always* have a fixed and definite intent to return and take up his home" where he was formerly domiciled (*Murphy*, *id.*, emphasis supplied).

The implication by the quotations that follow in that paragraph (Slip. Op., *infra*, pp. 7a-8a) is wholly illusory. The first, about the complexities of determining domicile, is from this Court's description of the problem it addressed in *Murphy*, not its resolution of that problem (*supra*, p. 8). The court's second quotation is a repetition of a confusing and misleading reference in *Alexander* to the *lack* of intent to return to a former home as though that must be proved by a person who has moved, to

establish that he is domiciled in his new location.[6] The third quotation is from a part of the legislative history of the District income tax act that is referred to in the *Murphy* opinion, not the Court's ruling.

Moreover, while giving this perverted lip service to the *Murphy* presumption, the court below accorded that presumption no legal effect in reaching its decision, and wholly ignored *Murphy's* requirement of the facts that must be adduced to overcome it. The court pointed to no evidence that petitioners ever intended to make their home in the District again, and respondent did not deny that there is no such evidence.[7] It is only reasonable to conclude that the court below simply adopted respon-

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[6] In *Alexander* the reference appears to have been *obiter dictum*, unnecessary to its holding that appellant there *was* domiciled where he lived, in Japan. For nothing in that opinion indicates any rejection of his contention "that the evidence in the record shows that the requisite intent of returning to this jurisdiction and resuming his domicile here was completely lacking" (370 A.2d at 1329).

[7] The testimony to which the court refers (Slip Op., *infra*, pp. 8a-9a) indicates at most a *conditional* intent to return to seek employment in Washington *if* need for employment should make that necessary. The court ignored petitioners' uncontroverted contention (Appellants' Br. p. 11) that there was nothing in the record to provide any nexus between employment in Washington and making their home there. It overlooked that they had sold their house here, their furniture, and "cleared everything" (R.33); that before leaving Geneva they bought a site for their retirement home in Cyprus and made preliminary arrangements for its construction, which was under way at the time of the trial (R. 37-39); that when they actually did return to the United States on July 6, 1971 Mrs. Andrews found employment in Washington, and within 38 days of their return they had bought a house in Bethesda, Maryland, and taken up residence there without considering looking for a house in the District (R. 13-14, 71-72).

dent's reliance on the continuity presumption,[8] thereby reintroducing the problem resolved in *Murphy* (*supra*, p. 8).

The egregiousness of this perversion of *Murphy* is compounded by the confusion it adds to the confusion that prevailed before *Murphy*. If this decision were to stand, *Murphy* would simply not be "the law" in the District for persons who leave to live abroad. Moreover, it would not be "the law" for persons who leave the District to live in another State whenever the District Government concludes that it will be "cost-effective" to "tax" such persons.

That prospect means that, insofar as the non-local impact of the decisions reviewed in *Murphy* and of the decision sought to be reviewed here is a factor in granting *certiorari*, the reason for granting the writ here is at least as great as it was there. The decision of the court below upholds the District Government's use of its color of taxing authority, where it has none under *Murphy*, to extort "taxes" from persons for whom it provides none of the benefits enjoyed by those who live here, or have a place of abode here for part of a year, or work here, own real estate here, or visit here. *Cf. Loughran* v. *Loughran*, 292 U.S. 216 (1934). Moreover, it upholds "taxing" such persons on income derived, not merely in part from outside the District, as in *General Motors Corp.* v. *District of Columbia*, 380 U.S. 553, 556-557 (1965), but derived almost entirely from outside the District.

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[8] Respondent had contended (Appellees' Br., p. 14): "Under the normal rule governing domicile [petitioners'] domicile continued to be where it had been established until they established another."

C. *Petitioners' constitutional contentions were given inadequate consideration by the court below.*— Petitioners claimed that respondent's practice of taxing persons who leave the District to live abroad, but not those who leave to live in another state, was discriminatory, that such discrimination could not be justified, and that it denied petitioners equal protection of the law, in violation of the due process clause of the Fifth Amendment, citing *Bolling* v. *Sharpe*, 347 U.S. 497 (1954) (Appellants' Br. pp. 27-28). Respondent had not controverted that contention. But the court below held that petitioners could not properly raise the question, "[h]aving failed to raise the issue in the trial court. . . ." In their petition for rehearing (p. 8) petitioners pointed out that in the trial court their brief had called attention to the discrimination and had contended that "intentional misuse of taxcollection powers is the essence of unconstitutionality" (R. 651, n.1). Disregarding the contention, the court below denied rehearing.

Petitioners also claimed that restitution for respondent's bad faith (*infra*, p. 5a) should include interest at 5.14% and 5.75% (R. 684-687) instead of the 4% respondent had conceded (Appellants' Br., pp. 26-27). The decision below (Slip Op., *infra*, p. 10a) found "this contention meritless," citing *Rosewell* v. *LaSalle National Bank*, 450 U.S. 503 (1981), as an example of cases that have deemed "refunding taxes with *no* interest . . . adequate relief for an aggrieved taxpayer. . . ." Petitioners pointed out in their petition for rehearing (pp. 7-8) that in reversing the Seventh Circuit's decision holding such a state statute unconstitutional, this Court had done so on the ground that the district court had no jurisdiction under the Tax Injunction Act, 28 U.S.C. § 1341, and had stated (450 U.S. at 515) that it "expressed no opinion" on the

constitutionality question. The denial of rehearing by the court below ignores its patent error.

A decision of the District of Columbia Court of Appeals that thus encroaches on petitioners' constitutional rights does not command deference by this Court as a matter of policy. *Whalen* v. *United States*, 445 U.S. 684, 687-688 (1980).

II. Denial Of Restitution For Respondent's Bad Faith In Forcing Relitigation Of The *Murphy* and *Pace* Rulings Was Egregious Error Of More Than Local Importance

The opinion below first predicated its denial of claims for restitution for respondent's bad faith on the testimony it held sufficient under its misreading of the *Murphy* opinion to establish petitioners' liability to the District's "taxes" (Slip Op., *infra*, p. 9a):

> Since [respondent] could have reasonably expected to prevail based on this testimony, the trial court could conclude that the respondent did not act in bad faith in continuing defending this suit.

This absolution of bad faith adds to the importance of review of the error of the court's misreading of *Murphy*. And then the court digresses (Slip Op., *infra*, p. 9a) in a discussion that would trivialize the charge of bad faith by treating it as a matter of *counsel's* "conduct"—of whose counsel's positions had been principally responsible for the delay in reaching a decision in the trial court (regardless of the validity and reasonableness of the positions taken on behalf of petitioners). After that digression the opinion below returned to the real question of bad faith in the first part of this self-contradictory statement (Slip Op., *infra*, p. 10a):

> Its conduct did not force [petitioners] to seek judicial aid for a right that was clear, defined and estab-

> lished; in fact the merits of the case have never been adjudicated.

In this statement the court below patently adopted respondent's contention (*supra*, pp. 11-12) that it had not been guilty of bad faith (although it had not adduced the facts required to overcome the *Murphy* presumption) because, respondent argued, *Murphy* permitted it to rely on the continuity presumption and thus did not provide a "plain rule" for decision. By this holding that *Murphy* did not provide a plain rule, the court below bootstraps the anomalous result that respondent could violate *Murphy* with impunity. The statement itself adjudicates the merits (adversely to petitioners) of their claim to be conclusively presumed, on this record, to be domiciled in Geneva, and on that basis holds respondent not liable for attorney's fees, etc. That adjudication makes it meaningless to say that "the merits of this case have never been adjudicated," even if the court meant by that, never adjudicated for the purpose of determining liability to make the refund with 4% interest, that respondent had conceded.

Where, as here, the respondent could not overcome the *Murphy* presumption, the real charge of bad faith cannot be so handily brushed off. Respondent's relitigation of the question that had been decided in *Murphy* and *Pace* in order to defend its unauthorized "tax" and thereby fortify its illegal source of revenue was calculated bad faith (*infra*, pp. 16-18). See *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, 247, 258-260 (1975); *Berens Sales Co.* v. *McKinney*, 310 A.2d 601, 603, n.5 (D.C. App. 1973); *Kahan* v. *Rosenstiel*, 424 F.2d 161, 167 (3rd Cir. 1970), *certiorari denied sub nom. Glenn Alden Corp.* v. *Kahan*, 398 U.S. 950 (1970). The opinion of the court below in *Berens Sales Co.* v. *McKinney (supra)*,

should have been sufficient in District courts, for there the court had been explicit on the bad faith of relitigating a decided question of law:

> We note that if appellant henceforth were to initiate a possessory action against other tenants who tender their rent in full but with a notation of protest then such litigation in the face of the trial court's decision in this case might well be deemed "vexatious, wanton or oppressive" and, accordingly, . . . constitute an exception to the general rule against allowance of counsel fees to the successful party. See *Shull* v. *Columbus Municipal Separate School District*, *supra*, 338 F. Supp. at 1378. . . .

Moreover, where it is the Government itself that is defying the limit on its powers resulting from the law plainly laid down in an admittedly applicable and controlling judicial decision, and where its victims are of a class of persons who are not likely to be able to avail themselves of judicial aid, the oppressiveness of the Government's conduct accentuates the need for the courts' exercise of their inherent equity powers. See *Hutto* v. *Finney*, 437 U.S. 678, 689 n.14 (1978); *Vaughn* v. *Atkinson*, 369 U.S. 527, 530 (1962); *cf. Bradley* v. *School Board of City of Richmond*, 472 F.2d 318, 327 (4th Cir.), reversed on other grounds, 416 U.S. 696 (1974); *Rolax* v. *Atlantic Coast Line R. Co.*, 186 F.2d 473, 481 (4th Cir. 1951).

In a pretense of a bona fide defense of its unauthorized "tax," respondent relied on the continuity presumption, although it had been told in *Pace*, 77 U.S. App. D.C. at 234, 135 F.2d at 251, that that presumption had "given way" to the *Murphy* presumption. It tacitly admitted as much. For when petitioners pointed out in oral argument in the trial court that respondent had no evidence to satisfy the *Murphy* requirement of proof for overcoming its presumption (R. 262-263, 267-269, *infra*, pp. 19a-22a)

respondent countered with the following revealing, self-conscious evasion (R. 278, *infra*, p. 22a, italics and punctuation supplied):

> And I may say for the Court that the issue—*that in terms of the issue the Government has always pursued* [—]wasn't whether there was intent to leave Switzerland to come back, it was always our *defense* that the Andrews never abandoned their domicile that they had here. * * *
>
> * * *
>
> [T]hat is the only thing that can be done, the only tactic that we can take in this case.

The motivation for such persistent "pursuit" of that false issue had emerged in an earlier oral argument after petitioners indicated some considerations governing use of the record of the 1973 trial, where there had been no showing of the required intent (R. 221-222, *infra*, pp. 15a-16a). In opposing use of that record, respondent argued for a new trial, to be held in Cyprus for the ostensible purpose of taking petitioners' testimony. In support of that proposal respondent unabashedly disclosed that it intended to continue its defense of this case and others like it, despite the adverse decision in *Alexander* eleven months earlier; that it had reason to believe that an association of State Department employees would defray the unusual expense such a trial in Cyprus would cause petitioners to incur, because of its members' special interest in the outcome of this case; and that other costs of such a trial would be more than offset by "hundreds of thousands of dollars" of savings in expenses of the litigation respondent expected from its continuance of such "taxes," if it lost this case (R. 228, 230-234, *infra*, pp. 16a-18a). And two years later, when it belatedly sought to get free from this case by offering full refund with 4% interest, it stipulated (R. 602) that it did "not for the

purposes of this case or any case which may be brought in the future, waive any of its rights, defenses, determinations or authority previously asserted in this case."

Petitioners protested (R. 608-622) that the practical effect of adoption of that proposal would be judicial license for respondent to continue such "taxation" and, by denying costs, reasonable interest, and attorney's fees, to put a protective ceiling on the financial liability respondent would risk in any litigation that might result—at less than it had suffered in *Alexander* where the prevailing party was awarded costs.[9]

The trial court granted respondent substantially the license its limited concession contemplated and the court below affirmed. Such a decision by the highest court of the District of Columbia, so crassly condoning governmental defiance of reiterated judicial rulings in cases to which respondent was a party, is in conflict with any responsible conception of public policy and sound administration of law. This Court should review this case to see that its ruling in *Murphy* (314 U.S. at 355-356), and that of the United States Court of Appeals for the District of Columbia in *Pace* (77 U.S.App.D.C. at 634, 135 F.2d at 251), are observed by the Government and courts of the District. *District of Columbia* v. *Thompson Co.*, 346 U.S. 100 (1953); *Loughran* v. *Loughran*, 292 U.S. 216 (1934). As Mr. Justice Murphy said, dissenting in *Fisher* v. *United States*, 328 U.S. 463, 490 (1946):

> The rule that this Court ordinarily will refrain from reviewing decisions dealing with matters of local law in the District of Columbia is a sound and necessary

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[9] *Alexander* v. *District of Columbia* (unreported), Sup. Ct. D.C., No. 2187, Judgment entered May 6, 1977.

one. But it is not to be applied without discretion. Like most rules, this one has its exceptions. And those exceptions are grounded primarily in considerations of public policy and sound administration of justice.

CONCLUSION

For the foregoing reasons petitioners submit that a writ of certiorari should be granted.

Respectfully submitted,

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Tel. 356-3752
Counsel for Petitioners

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 81-78

FREDERICK P. ANDREWS

and

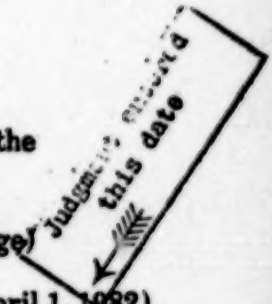
EDITH W. ANDREWS, APPELLANTS,

v.

DISTRICT OF COLUMBIA, APPELLEE.

Appeal from the Superior Court of the District of Columbia

(Hon. John D. Fauntleroy, Trial Judge)



(Argued November 18, 1981 Decided April 1, 1982)

Howard E. Wahrenbrock, with whom *Jay E. Hickey* was on the briefs, for appellants.

Robert J. Harlan, Jr., Assistant Corporation Counsel, with whom *Judith W. Rogers*, Corporation Counsel, *Charles L. Reischel* and *James E. Lemert*, Deputy Corporation Counsel, and *Richard L. Aguglia*, Assistant Corporation Counsel, were on the brief, for appellee.

Before KELLY, NEBEKER and BELSON, *Associate Judges.*

Opinion for the Court by *Associate Judge* KELLY.

[657]

Opinion concurring in part and dissenting in part by *Associate Judge* NEBEKER at p. 11.

KELLY, *Associate Judge*: At issue in this appeal is the validity of the trial court's denial of attorney's fees to appellants because of the alleged bad faith conduct of appellee. Finding no abuse of discretion in the court's ruling[1] and no merit in the other issues on appeal, we affirm.

I

When this distressing saga began, appellants resided in the District of Columbia on McKinley Street, N.W. Mrs. Andrews was employed as a labor economist with the U.S. Department of Labor. Appellants sold their home in the District and, on November 15, 1969, moved to Geneva, Switzerland, where Mrs. Andrews worked as a U.S. Civil Service employee on loan to the International Labor Organization (ILO). When the ILO suffered financial reverses, they extended Mrs. Andrews' employment contract for six months to June 1971, but she refused to accept their offer of monthly extensions thereafter.

Before returning to the United States, appellants searched in Europe for a retirement home. They ultimately purchased land in Cyprus, Greece, with the intention of retiring there as soon as finances permitted. On July 6, 1971, appellants returned to Washington, D.C., where Mrs. Andrews resumed employment with the U.S. Department of Labor. They lived in a hotel in the District for a month while seeking a house in the suburbs, and on August 13, 1971, moved to a home in Bethesda, Maryland.

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[1] "Where the trial court exercises its discretion on the issue of award of attorney's fees, our role on review is to determine whether the court abused that discretion." *Trilon Plaza Co. v. Allstate Leasing Corp.*, D.C.App., 399 A.2d 34, 38 (1979).

II

The District of Columbia government collected $1,813 in income taxes from appellants for the period from November 15, 1969 to August 13, 1971, pursuant to D.C. Code 1981, §§ 47-1801.4(17), -1806.3 (a tax levied on those persons who are domiciliaries of the District on the tax day). When appellee denied appellants' request for a tax refund, appellants sued in Superior Court, contending that they did not owe the tax because they were not domiciled in the District during the period in question. A bench trial was held before then Judge Harry T. Alexander on April 18 and 19, 1973. Appellee moved for an immediate decision at the end of the trial, but appellants opposed the motion in order to have the opportunity to file a trial brief. Appellee's motion was denied, a trial transcript was prepared, and briefs were filed. The series of events which followed defy explanation from the court and do no credit to the judicial process.

On December 1, 1976, after three years of silence, appellants moved to expedite decision. Pursuant to this motion, Judge Fred Ugast explained to counsel that the trial judge had retired without deciding the case and that the court file, including the trial exhibits, had been misplaced. When counsel could not settle the case, they filed a joint request for decision based on the trial transcript and the trial briefs. On January 3, 1977, Judge Ugast declared a mistrial, ruling that since the question of domicile appeared very close he could not decide the case without observing appellants' demeanor on the stand to determine issues of credibility. A motion to reconsider was denied on May 11, 1977. On June 6, 1977, because appellants had moved to Greece and could not, without considerable sacrifice, return to the United States for a new trial, they appealed from the denial of reconsideration of the mistrial order. That order was not appealable,

however, and the appeal was dismissed on November 9, 1977. Appellants then moved for a new trial and admission of former trial testimony and exhibits on December 7, 1977. Judge John Garrett Penn granted the motion for a new trial and admission of former trial testimony, but because appellee objected to the identification and filing of appellants' copies of appellants' former trial exhibits, he requested that counsel confer and report back on the status of the trial exhibits. Judge Penn resigned from the court before a decision was made as to the use of the duplicates of the former trial exhibits.

Undaunted, appellants filed a motion for substitution of documents as duplicates in lieu of lost exhibits one through five (appellants' exhibits only). Appellee failed to reply in writing to this motion, but opposed it at oral argument, counsel noting that he was trying to settle the case. Judge William Pryor granted the motion on July 11, 1979, the date of the oral argument. On the trial date, October 30, 1979, Judge John Fauntleroy (differing with Judge Ugast) decided a trial was unnecessary and that he would decide the case on the record, after submission of exhibits and a legal memorandum by appellee with an opportunity for appellants to respond. Appellee, characteristically, failed to file the requested documents within the allotted 30 days, so on December 12, 1979, appellants filed yet another motion for decision. In its reply to this latest motion, filed January 11, 1980, appellee, in apparent surrender, withdrew its opposition to granting a refund to appellants, together with the allowable statutory interest, insisting however that its action in no way waived any of its rights, defenses, determinations or authority previously asserted in the case for purposes of this case or any future case. Appellants opposed appellee's equivocal proposed withdrawal and filed a brief on the merits on February 19, 1980. At a hearing on May 28, 1980,

Judge Fauntleroy stated that he was prepared finally to decide the merits and dispose of the case, but wanted to tie all pending matters into one order. Because appellants wanted a decision on an award of attorney's fees and an award of interest on the refund above the statutory rate to be included in the order, the court continued the case until July 16, 1980, for oral argument on those issues. On July 9, 1980, appellants filed a motion to determine reasonable attorney's fees and interest and a request for further findings. Appellee filed its reply on July 16, 1980, the date of the hearing. Judge Fauntleroy found that "the record fails to disclose that the District of Columbia acted in bad faith," and accordingly denied appellants' request for attorney's fees. He also ruled that he was bound to follow the interest rate fixed by statute. Accordingly, he awarded interest on the refund at the statutory rate of 4%, and requested appellee to file a proposed order. Appellants filed a motion to expedite entry of final judgment on July 31, 1980. Appellee filed proposed findings of fact, conclusions of law and order on August 8, 1980; and appellants filed comments thereon on August 13, 1980. The court entered its findings of fact, conclusions of law and an order on January 6, 1981. Notice of appeal was timely filed on January 16, 1981.

III

The general, or American rule, is that in the absence of statutory authority the prevailing party may not recover attorney's fees. *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240, 245 (1975); *American Federation of State, County and Municipal Employees, AFL-CIO v. Ball*, D.C.App., 439 A.2d 514 (1981) (*AFSCME v. Ball*); *Trilon Plaza Co. v. Allstate Leasing Corp.*, D.C.App., 399 A.2d 34, 37 (1979). This rule is based on notions that "no person should be penalized for merely defending or prosecuting a lawsuit" and that "the threat of having to

pay an opponent's costs might unjustly deter those of limited resources from prosecuting or defending suits." *Harkeem v. Adams*, 117 N.H. 687, 690, 377 A.2d 617, 619 (1977). On the other hand, when a party institutes or prolongs litigation through bad faith, or obstinate, unjust, vexatious, wanton, or oppressive conduct, a court, through its equity power, may award counsel fees to the opposing party. *See id.* at 690-91, 377 A.2d at 617; *Hutto v. Finney*, 437 U.S. 678, 689 n.14 (1978); *Trilon Plaza Co. v. Allstate Leasing Corp.*, *supra* at 37; 6 MOORE'S FEDERAL PRACTICE § 54.77[2], at 1709 (2d ed. 1981). Under this exception, an award of attorney's fees "vindicates judicial authority without resort to the more drastic sanctions available for contempt of court and makes the prevailing party whole for expenses caused by his opponent's obstinacy." *Hutto v. Finney*, *supra* at 689 n.14. Nevertheless, the court's equity power is to be exercised only under extraordinary circumstances. *Sprague v. Ticonic National Bank*, 307 U.S. 161 (1939); *e.g.*, *Bradley v. School Board of City of Richmond, Virginia*, 345 F.2d 310, 321 (4th Cir.), *vacated on other grounds*, 382 U.S. 103 (1965); *see* 6 MOORE'S FEDERAL PRACTICE, *supra* at § 54.77[2], at 1709-11. In *Harkeem v. Adams*, *supra*, the court reasoned that an award of attorney's fees is warranted "[w]here an individual is forced to seek judicial assistance to secure a clearly defined and established right, which should have been freely enjoyed without such intervention . . . ." *Id.* at 691, 377 A.2d at 619. *See also Bradley v. School Board of City of Richmond, Virginia*, *supra* at 321; *Shull v. Columbus Municipal Separate School District*, 338 F. Supp. 1376 (N.D. Miss. 1972). In that case, a determination by the New Hampshire Department of Employment Security (DES) that the appellant was ineligible for unemployment benefits because he had voluntarily quit his employment was overturned by the

court. Nevertheless, DES used the same rationale to disqualify the appellant from benefits for a second period of time, necessitating a second hearing. At this hearing, DES argued the appellant's ineligibility for unemployment benefits on totally different grounds. The court found that there was no basis to deny the appellant his benefits and that the conduct of DES was arbitrary, capricious, frivolous, unreasonable, and violated principles of fair play. Accordingly, it awarded attorney's fees to the appellant. In *AFSCME v. Ball*, *supra* at 516, an award of attorney's fees was sustained when "AFSCME sought three times in two jurisdictions, each time proffering the same rationale, to frustrate the [District of Columbia] Superior Court's orders."

In the instant case, appellants contend (with understandable impatience) that because the law was clearly on their side, appellee's defense of this lawsuit for eight years before acceding to a tax refund constituted bad faith conduct justifying an award of attorney's fees. This argument is appealing but, ultimately, is not dispositive. In the District of Columbia, an income tax is levied on all domiciliaries of the District on the tax day. *Alexander v. District of Columbia*, D.C.App., 370 A.2d 1327 (1977); D.C. Code 1981, §§ 47-1801.4(17), -1806.3. Appellants argue that *District of Columbia v. Murphy*, 314 U.S. 441 (1941), establishes a presumption that one is domiciled where one lives and the burden of proof at trial is on the party claiming otherwise. Since appellants were living in Switzerland during the period of time in which they were taxed in the District, they contend that it was the appellee's burden at trial to prove that they were not then domiciliaries of the District of Columbia. Appellants are correct in their assertion that "[t]he place where a man lives is properly taken to be his domicile until facts adduced establish the contrary," *id.* at 455, but they are

incorrect as to the burden of proof. The *Murphy* opinion states that "[i]f one has at any time become domiciled here, it is his burden to establish any change of status upon which he relies to escape the tax." *Id.* at 456. It is unquestioned that appellants were domiciliaries of the District of Columbia before moving to Geneva, Switzerland. Thus, it was their burden to prove that they changed their domicile at that time. "[T]he question of domicile is a difficult one of fact to be settled only by a realistic and conscientious review of the many relevant (and frequently conflicting) *indicia* of where a man's home is . . . ." *Id.* at 455. "[T]o prove that persons who have left their former dwelling places and have taken up residence in another state in order to accept work in the federal civil service are domiciled in their new location, the facts adduced must demonstrate that such persons 'have no fixed and definite intent to return and make their homes where they were formerly domiciled.'" *Alexander v. District of Columbia*, *supra* at 1329 (quoting *District of Columbia v. Murphy*, *supra* at 454-55). Domicile has been defined as "the place where one has his true, fixed, permanent home and principal establishment and to which, whenever he is absent, he has the intention of returning. . . ." *District of Columbia v. Murphy*, *supra* at 451 (quoting 84 CONG. REC. 8974 (1939)).

A trial court could reasonably have concluded from the evidence adduced at trial that appellants' domicile was in the District of Columbia. Mrs. Andrews testified that she wrote to one Mrs. McGuire of the U.S. Civil Service Retirement in December 1970, stating that when her contract expired on June 30, 1971, she would return to Washington to seek employment. Mr. Andrews testified that his sole purpose in leaving the United States to go to Switzerland was so that his wife could fulfill her one year contract with the ILO. He also testified that he filed an applica-

tion for permit to reenter the United States under no compulsion, but because he intended to return to the United States. In October 1970, he stated on an application for extension of a permit to reenter the United States that the reason for the requested extension was that his wife's contract was up for an extension. Since appellee could have reasonably expected to prevail based on this testimony, the trial court could conclude that appellee did not act in bad faith in continuing defending the suit, a position which is bolstered by the fact that at least one trial judge considered the question of domicile in this case to be close.

Furthermore, the excessive delays in the resolution of this case were caused largely by appellants and the court system, not by appellee. In the almost 8½ years from April 1973, when the trial was held, until January 16, 1981 when the notice of appeal was filed, only two periods of delay can be attributed to appellee. The first, from December 7, 1977 to July 11, 1979, occurred when appellee objected to having duplicates of former trial exhibits entered at a new trial. This was a valid and reasonable position for appellee to take and cannot be deemed to have been undertaken in bad faith, solely for the sake of delay. The other period of delay arguably attributable to appellee was a one month, eleven-day period between November 30, 1979 and January 11, 1980, when appellee was supposed to file its exhibits and a legal memoranda, but instead filed a reply cancelling its objections to the refund. Such a short period of delay does not rise to the level of bad faith conduct justifying an award of attorney's fees.

Despite its obduracy, appellee's conduct does not approach that of the parties in the cases cited above. Its argument that appellants were in fact domiciliaries of the District and were legally subject to income taxation in the District remained unchanged throughout the lawsuit.

Its conduct did not force appellants to seek judicial aid for a right that was clear, defined and established; in fact, the merits of the case have never been adjudicated. Appellee supposedly dropped its opposition to the tax refund because continuance of defending its claim became cost ineffective. The merits were not adjudicated largely because of delays induced by appellants. Accordingly, we hold that the trial court did not abuse its discretion in denying counsel fees to appellants.

IV

Appellants contend that an award of 4% interest on the tax refund authorized by D.C. Code 1973, § 47-2413(c) (now D.C. Code 1981, § 47-3310(c)) is insufficient. Because refunding taxes with *no* interest has been deemed adequate relief for an aggrieved taxpayer, we find this contention meritless.[2] *E.g., Rosewell v. LaSalle National Bank*, 450 U.S. 503 (1981).

V

Finally, appellants contend that appellee is practicing unjustifiable discrimination in violation of the due process clause of the Fifth Amendment because it allegedly differentiates between taxpayers who leave the District to live elsewhere in the United States and those who leave the District to live abroad. Having failed to raise this issue in the trial court, appellants cannot properly raise it here. *See Miller v. Avirom*, 127 U.S.App.D.C. 367, 369-70, 384 F.2d 319, 321-22 (1967).

Affirmed.

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[2] We need not reach appellants' constitutional claim that the appellee effected a taking of their property for public use without just compensation because statutes indicate that 4% interest is a fair return on a tax refund.

NEBEKER, *Associate Judge*, concurring in part and dissenting in part: Appellants have been treated most shabbily in this case, and mainly so by the Superior Court. We cannot wash our hands of this by viewing the case through a prism which divides the state into judicial and litigating arms and then say to appellants the District's counsel was not at fault, take your hollow victory and do not feel too ill of the judicial process for this inexplicable treatment. We compound the insensitivity by ritualistic recitation of rules on burden of proof, domicile, chilling access to the courts, and abuse of discretion. By whatever rubric—equity, abuse of discretion, or our own authority under D.C. Code 1981, § 17-306—I would direct payment of reasonable attorney's fees in this case.

DISTRICT OF COLUMBIA COURT OF APPEALS
500 Indiana Avenue, N.W.
Washington, D.C. 20001
(202) 638-7113

No. 81-78

2190

FREDERICK P. ANDREWS, *et al.*,

Appellants,

v.

DISTRICT OF COLUMBIA,

Appellee.

Before: Kelly, *Nebeker, and Belson, Associate Judges.

Filed
May 21, 1982
/s/ Alan I. Herman
ALAN I. HERMAN
Clerk

ORDER

On consideration of appellants' petition for rehearing, it is ORDERED that the aforesaid petition is denied.

PER CURIAM

Copies to:

HONORABLE JOHN D. FAUNTLEROY

Clerk, Superior Court

HOWARD E. WAHRENBROCK, Esquire
1201 Connecticut Avenue NW, #708, 20036

CHARLES L. REISCHEL, Esquire
Deputy Corporation Counsel

*Associate Judge Nebeker would grant the petition for rehearing.

SELECTED PORTIONS FROM TRANSCRIPTS OF ORAL ARGUMENTS

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

Tax Division No. 2190

FREDERICK P. ANDREWS, *et al.*,
Petitioners,

v.

THE DISTRICT OF COLUMBIA,
Respondent.

Washington, D.C.

January 18, 1978

[R212] The above-entitled action came on for a hearing before the Honorable JOHN GARRETT PENN, Associate Judge, in Courtroom Number C-224, commencing at approximately 10:22 a.m.

* * *

APPEARANCES:

On behalf of the Petitioners:

HOWARD E. WAHRENBROCK, Esquire
Washington, D.C.

On behalf of the Respondents:

MELVIN WASHINGTON, Esquire
Assistant Corporation Counsel

* * *

[R221] MR. WAHRENBROCK: In other words, if we stipulated for the decision on the old record that neither one of us would

seek to introduce more evidence at the new trial. But I was attempting to lay out the basis for the central contention which we will make. That is, on the evidence in the old record or whatever evidence is before this Court, there is a presumption that the Andrews, when they went to Geneva and lived in Geneva, were domiciled where they were living. Now, that is the usual rule for—ever since the *Murphy* case and I think before. That is the rule with respect to persons who come to the District of Columbia to accept employment in the Federal government. And in accepting employment in the [R122] Federal government, begin to live in the District of Columbia. And having accepted employment and begun to live, they are presumed to be domiciled here, in the absence of a showing of intention to return to their former domicile.

There is no evidence in the record, and we expect that none can be provided, that the Andrews had any intention at any time of returning to the United States.

* * *

[R228] [MR. WASHINGTON:] We suggest that accommendations, if in the interest of justice, can be made, and we can sit in Cyprus.

I am fairly confident that financial arrangements, at least for the Court and myself will be made.

The question is of such a magnitude that I am informed that the State Department Employee Service and the Foreign Service Officers Court would probably finance the cost of putting on the petitioners' case in Cyprus because the facts of the case are such now that whatever the ruling is here, and if either one of us take it up, it will set for the first time the pattern for which their resident employees can utilize in order to look for retirement homes and the like.

THE COURT: So the State Department has an interest—

MR. WASHINGTON: The Employees Service has an interest in this case. And it is not of casual interest. It is an interest in the case from the standpoint of assignments, taking new assignments, what to do, especially for employees that are within three, four, five, six, seven years of retirement. And the case is

of such a magnitude, it will set such a precedence, we are of the view that to finance to try the case in Cyprus, would not be a problem if we just look around a little bit.

I would suggest that we could go over and take the Andrews' portion of the trial over there.

* * *

[R230] MR. WASHINGTON: Well, I think a matter of this nature, I believe, that the Court would bear your expense. Superior Court would bear your expense. And our office would take care of mine. And the State Department Security—State Department Employee Service would take care of Mr. Wahrenbrock's and the like.

* * *

[R231] [MR. WASHINGTON:] The money aspect, I believe, to support the Andrews' half, Mr. wahrenbrock, and the like would come from the State Department's Employee's Organization because they are the ones that—

[R232] THE COURT: That is the Andrews' part?

MR. WASHINGTON: That is the Andrews' part. They are the ones that would benefit from the like.

* * *

MR. WASHINGTON: It may be that the Court would be interested enough in the problem, since at the present time there are about—I'd say Alexander and two other cases, that [R233] go in different directions on what is really meant by domicile, what, when, and how. This is the first time that I have found that I know of what we have had the exact or precise set of facts to make the kind of record that from which we could once and for all define for all purposes domiciliaries, what happens to people when they leave, when they pick up new ones, what happens during the interim, and the like.

It is the first time we have really been presented with a case that has the fact pattern, a classical fact pattern where we could go into it and examine the question.

I think from that aspect, it would save for whatever the cost is if we look down the road five, ten years, it would save the Court judicial time, effort, and the like down the road a period. And while it may seem to cost now, not to do it, it may be classified as a false economy because if we look down the road, we can save hundreds of thousands of dollars we would have to expand if we had not come up with the kind of fact pattern and people and everything that we have. It is just a classical case.

My only regret is that it wasn't decided earlier because it is a classical case. It is one of the few times when we have everything that we need, both sides. It is a matter you can write the law and tie together all of the three or four different cases that now is the law in the District of Columbia. You know, it is one we can pull together. It [R234] could even have it back here and set the tone. I think it is a good case. And it is worth the investment on the part of the Court.

* * *

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
TAX DIVISION

Tax Division No. 2190

FREDERICK P. ANDREWS, & EDITH ANDREWS,
Petitioners,

v.

DISTRICT OF COLUMBIA,
Respondent.

Washington, D.C.

Tuesday, October 30, 1979

[R255]The above-entitled action came on for a hearing before the Honorable JOHN D. FAUNTLEROY, Associate Judge, in Courtroom Number 42, commencing at approximately 11:50 a.m.

* * *

APPEARANCES:

On behalf of the Petitioners:

HOWARD E. WAHRENBROCK, Esquire
1141 Waverly Way
McLean, Virginia 22101

On behalf of the Respondent:

MELVIN WASHINGTON, Esquire
Assistant Corporation Counsel

* * *

[R262] MR. WAHRENBROCK: Now, that brings me to really what I think is the nitty-gritty of this matter. During the interim, since the case was first tried, there has been a decision

of the District of Columbia Court of Appeals in *Alexander against the District of Columbia*, which was reported in 370 Atl.2d, at page 1327, decided in 1977, which is, we think, Your Honor will find controlling on the single issue that is before the Court on this case. That decision was based on the decision of the United States Supreme Court in *District of Colubmia against Murphy*, reported in 314 U.S. at page 441.

Based on the principle that was there applied, the [R263] principle that was there applied was applied where the parties whose domicile was in question, were then living in the District of Columbia. And the Suprme Court said in passages which we briefly quoted in our motion to Judge Penn, that persons are presumed to be domiciled where they are living. In the absence of showing that they have a firm and fixed intent to return to their previous domicile—

THE COURT: That's a legal argument that you are making now which can be supplemented.

MR. WAHRENBROCK: I am making that argument now, Your Honor, and you properly raised the question. I am making it because it goes to the issue which is much narrower that has been conceived of, and is conceived of by Respondent's counsel when he emphasis, as he does, the witnesses' testimony in person.

I realize the handicap we are under from working with a written record, but this was not our fault, and it is as Judge Penn said, an attempt to prevent a miscarriage of justice that he granted the motion. It is not necessary in order to prevent any miscarriage of justice to allow Respondent's counsel to avail himself of previous testimony and exhibits.

* * *

[R267] THE COURT: All right.

MR. WAHRENBROCK: Now I'd like to come to the question that I got diverted from—that I sought to address myself to.

I was going to suggest that the single issue in this case is whether there is any evidence that Petitioners, while they were living in Geneva, Switzerland, had any firm intent to return to their former domicile in the District of Columbia. And as we have pointed out in the previous two motions—our previous two motions, there is not a trace of evidence in the entire record that he now seeks to put before Your Honor, that Petitioners did intend—have any fixed and definite intention. And I am using the words of—I think it was Mr. Justice Jackson of the Supreme Court, and they are repeated and picked up by the Court of Appeals in the Alexander case, that there was any firm intention to return to live in the District of Columbia when they unexpectedly had to terminate their residence in Geneva, and came back as they did not expect to to the United States.

They did not even then intend to live in the District of Columbia where their former domicile was. Instead, and the record that he seeks to use indicates their uncontroverted testimony, that when they returned they thought of [R268] living in Virginia where her brothers lived, or they thought of living in Maryland where they subsequently did within five weeks of their return to the United Staes, purchase a house and make their home there from 1971 to the time that they left after Mrs. Andrews' retirement. She became the breadwinner of the family.

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MR. WAHRENBROCK: I have made all of those arguments except the use of the Court of Appeals decision. And that same principle is involved in the Supreme Court's decision, and there has never been an answer to it. I have made it in the memoranda. I have reached the point where we have got to have a legal decision on whether expressions—evidence of intention to return to the United States is equivalent to a firm intention to resume domicile in the District of Columbia.

[R269] There is no trace of evidence to that effect, and I'd like to have the clearest way I can of presenting that issue to Your Honor, and I think that issue is dispositive.

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[R278] [MR. WASHINGTON:] And I say for the Court that the issue—that in terms of the issue that the Government has always pursued, wasn't that whether there was intent to leave Switzerland to come back, it was always our defense that the Andrews never abandoned their domicile that they had here. That was always our intent. We think that you can glean from the transcript without the exhibits and discern that from their own testimony, and that's always been our argument.

THE COURT: All right.

MR. WASHINGTON: And to the extent, and that is the only thing that can be done, the only tactic that we can take in this case, and because—and again defending the case as we did, it depended in large measure on the testimony of Andrews.

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